IN THE
SUPREME COURT OF THE UNITED STATES

J. W. BARNETT, Sr., et al ..... Petitioners

v.

CHESTER BOWLES, Administrator ..... Respondent

SUPPORTING BRIEF OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF ISSUES

The Petitioners were indicted in the District Court of the Eastern Division of the Southern District of Mississippi for selling various brands of whiskies above the maximum prices prescribed by the Administrator of the Office of Price Administration in Regulation No. 445.

Petitioners filed complaint in the Emergency Court of Appeals seeking to have the Regulation declared invalid as to such liquors, since under the laws of Mississippi such liquors are contraband and without property rights. The Court held the Regulation valid and dismissed the complaint. They seek a review of that judgment, as appears from the Petition for Writ of Certiorari herewith filed.

Two questions are presented:

First, was it the purpose and intention of the Congress to delegate to the Administrator the power to regulate the sales of such liquors and fix a maximum price therefor in Mississippi?

Second, if the answer is Yes, Then did the Congress have the Constitutional power to do so under the Twenty-first Amendment and the Statutes of Mississippi?

ARGUMENT

1. The Intention of the Congress.

Two things are axiomatic:

First. The Court will examine the Emergency Price Control Act and giving effect to all its parts and provisions, thence deduce the intention of the Congress and give effect to the intention.

Second. That construction will be given, if possible, which will save the Act from any grave doubt as to its Constitutionality.

TWO CLASSES OF COMMODITIES

The commodities of the Nation are divided into two sharply defined classes:

First. Those wholesome and innoxious commodities that constitute the great body of commerce, the necessities of life, and those luxuries that gratify human vanity or serve the convenience of mankind.

We submit that the Congress was dealing only with this class of commodities in passing the Act. The *Yakus* Case dealt with this class of property only.

Second. Those commodities that by their inherent na-

ture, such as intoxicating liquors, with which we are here concerned, are classified as noxious.

The Twenty-first Amendment deals with these commodities and has segregated them from all other commerce, and are dealt with separately by Statutes of Congress and the States, in digests, even in Revenue Statutes.

Intoxicants must be sub-classed into those than can be lawfuly sold under the laws of the States and those that are contraband in virtue of State laws. The Twenty-first Amendment applies only to this class where importation is prohibited by the laws of a state.

The Court below did not give recognition to these two distinct categories, and held that since whiskies are commodities, and were not expressly excluded by the Act they were necessarily included.

The Court in failing to give effect to all the provisions of the Act and construing it to apply to both types, adopted that construction that renders the Act unconstitutional as to intoxicating liquors in prohibition States, whereas the alternative construction would, we submit, have carried out the will of Congress and eliminated any Constitutional question.

There is no magic in a word. The Act was dealing with the Nation's commerce and the Nation's property. In that sense commodities connotes property and property rights. Property rights being absent, "prices" became meaningless.

The Commerce Clause, the Equal Rights Clause, the

Due Process Clause are not shelters for this type of property for Mississippi has destroyed its property rights and declared it to be contraband.

Brewing Co. v. Liquor Commission 305 U. S. 391, 394.

Ziffrin Inc. v. Reeves 308 U. S. 132, 140.

Crane v. Campbell 245 U. S. 304, 307.

Samuels v. McCurdy 267 U. S. 188, 198.

INHERENT NATURE OF COMMODITIES FIX THEIR STATUS UNDER THE CONSTITUTION

It is not by definition that commodities, under the Constitution, are to be classified and labeled, but by their inherent characteristics, their tendencies toward good or toward evil.

This Court fifty-eight years ago, in a memorable decision, ever since followed and never modified, announced the fundamental difference and the distinct cleavage between these two classes of commodities.

Mugler v. Kansas 123 U. S. 623,
we quote, page 657:

> "In the *License Cases,* (5 How. 504) the question was, whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors were repungant to the Constitution of the United States. In determining that question. it became necessary to inquire whether there was any

conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: 'If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.' * * * * Mr. Justice Grier, in still more emphatic language, said: "The true question presented by these cases, and one which I am not disposed to evade, is whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. . . . . Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals must come within this category . . . . . It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appaling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. The *police power*, which is *exclusively* in the States, is *alone competent* to the correction of these evils, and all measures of restraint or prohibition necessary to effect

the purpose are within the scope of that authority. (pp. 631, 632.)"

This decision was handed down forty-six years before the Twenty-first Amendment, which Amendment, as we shall see, pledged the National Government to see to it that intoxicating liquor shall not enter the dry states.

It is the "Ishmaelite" of commerce. Its "tendency is to get out of legal bounds" *Duckworth* Case (314 U. S. 396); "The people of the United States knew that liquor is a lawlessness into itself." (Page 398).

THE STATUS OF INTOXICANTS DEPEND ON STATE LAWS

No passports are needed at state lines for the Nation's innoxious commerce, the States cannot interdict its importation or exportation, but because of its inherent qualities the States may do both with liquors, but even in passing through by motor transportation, it must be carried by roads marked out by the State, carry permits issued by the State, convoyed by armed guards of the State and under State control.

State Bd. of Equalization v. Young's Market Co. 299 U. S. 59.

Duckworth v. Arkansas 314 U. S. 390.

Carter v. Virginia 321 U. S. 131.

Ziffrin Inc. v. Reeves 308 U. S. 132.

Bacardi Corp. v. Domenech 311 U. S. 150, 168.

The National Government, if it so chooses, may permit or deny importation of liquors into its Reservations, subject to such controls as it sees fit, its jurisdiction there is exclusive, and the States, if they so choose, may exercise final control or total prohibition as they decide.

Collins v. Yosemite Park 304 U. S. 518, 533.

Pacific Coast Dairy Co. v. Dept. Agr. 318 U. S. 285.

The commodities treated of in the Twenty-first Amendment are not only unrelated to those protected, encouraged and fostered by the other provisions of the Constitution, but are repugnant thereto and are to be controlled, proscribed or confiscated as the State may declare.

The majority opinion below said that since intoxicating liquors were not expressly *excluded* by the Act they were thereby *included,* for the Act included all commodities not expressly excluded, and that liquors were commodities. In short, if we understand the opinion, it is that the inherent nature of the commodities and the different laws and Constitutional provision governing them, and the repugnance, as we have seen, between them do not divide them into two classes for the purpose of construing the Act, and the innumerable decisions of this Cout (none of which are cited) denouncing the one and shielding the other, was no part of the Congressional consideration when the Act was passed.

Every exclusion named was with reference to lawful things and lawful relationships. If *every* exclusion was as to some lawful business or transaction, is it not reasonable to conclude that that was the type of commodities the Act dealt with?

Is it conceivable that because the sale of lottery tickets in the Irish sweepstakes was not expressly excluded, the Administrator would expressly be authorized to fix a maximum price as he could for a theatre ticket? Merely because houses of prostitution, or other nuisances, were not expressly named and excluded would that confer power on him to regulate them and prescribe conditions under which the "poor soiled doves of the under world" could be evicted from their brothel-cotes? Merely because the furtive opium peddler is not named, therefore the Act conferred the power to fix prices on "dope" and thereby enter into an unseemly race with the Narcotic Unit that seeks to suppress and destroy, whilst he gave *tacit* permission to sell at a fixed price? Merely, because "moonshine" is not excluded, *eo nomine*, would the Administrator have the right to prescribe prices for the "shiners dew" and add respectability to a commodity that a thousand Alcoholic Tax Unit boys seek by day and by night to find and destroy?

But why multiply instances? The Congress was dealing with a serious and delicate situation. There were millions of State and Federal Officers to hunt down, check and destroy those things inherently destructive of the social order, but there were no policemen to cope with the greed of landlords or the unconscionable vendors of life's necessities. The Act was passed to protect the American people against their plunder and not to guarantee cheap contraband liquors.

BACK GROUND TWENTY-FIRST AMENDMENT

Before noticing the declared purpose of the Congress in passing the Act, we will, for a moment, view the background against which the Congress worked, and note in

passing that neither in the committee hearings or the debates in Congress was the subject of intoxicants broached. The Congress was lighting no fuse to explode political dynamite.

No product of mankind has ever been of such anxious concern to all Nations as the traffic in intoxicants. Affected by climate and the character of the population, the laws and regulations have been in incessant flux. Nothing has been the object of so much experimentation, trial and error, and varied regulation and proscriptions.

ENCYCLOPEDIA BRITANNICA, "LIQUOR LAWS".

Since 1794, 151 years ago, when Washington and Hamilton sallied forth to suppress the "Whiskey Rebellion" against the first excise tax, to this day, this Nation has been harrassed, teased and perplexed by this problem.

It would invite the impatience of the Court and violate its rules as to conciseness to go into that history and the myriad experiments of National and State Governments. It is a tragic and drab story; the effort through the Wilson Act, the Volstead Act, and finally the Eighteenth Amendment to suppress the traffic as a war measure; how the distillers and producers conceded, and this Court held, that the total suppression of the traffic was "an appropriate means of increasing our war efficiency."

Hamilton v. Kentucky Distilleries 251 U. S. 146, 156.

If a sober Nation in World War I and in all past wars could prosecute war more efficiently, then how can a few dry states hamper the efficient prosecution of World War II?

The first World War came to its victorious conclusion, but the Volstead Act and the Eighteenth Amendment remained.

Suddenly, all the furies of Orestes and all the evils of Pandora's Box swarmed upon the great cities. "Home brew" foamed and popped, poisoned concoctions, masquerading under forged labels of respectibility, brought disease and death. Racketeers roamed the streets leaving death and misery in their wake; police forces were impotent, "all the King's horses and all the King's men" couldn't cope with it; cartoonist had their heyday with the cadaverous gentlemen riding a famished camel, the very genius of bigotry and intolerance. Then the towns, the hamlets and villages and the rural dwellers, without police protection, smarting under the rememberance of more than a century of hopeless effort to prevent the importation of liquors into their communities, while the flood poured in under the protection of the Commerce Clause and the "original package" rule, sent forth their paunchy, masked and lead piped armed caricature, the embodiment of crime and debauchery. So the war raged for some fifteen years.

Then there appeared a flag of truce and the terms of the Armistice were:

If the States will adopt a Constitutional Amendment repealing the Eighteenth Amendment, then never again shall intoxicating liquors enter a State *except with the consent of that State* and the National Government will pledge its faith to prevent the importation, if contrary to the laws of that State.

The Twenty-first Amendment was then adopted by the

people through their State conventions, the only Amendment ever so adopted. It then became a covenant among the American people themselves.

The Congress in obedience to this mandate of the American people, enacted the Liquor Enforcement Act of 1936, so aptly cited by Chief Judge Maris in his dissent.

LIQUOR ENFORCEMENT ACT

27 U. S. C. A. Sections 221 et seq.

Section 223 prohibits the importation into dry States and prescribes penalties for so doing.

Section 224 provides that all such liquors, containers, vehicles or vessels used in such transportation shall be seized and forfeited. Such liquors are contraband even under the Federal law.

Thus stood the laws when the Emergency Price Control Act was passed in 1942. *Intention to Interfere With Penal Laws of State Must Clearly Appear.*

Under the laws of Mississippi the manufacture of liquor, the ownership or possession of a still, the possession or sale of, advertising for sale or displaying price lists are all crimes, following the usual pattern of prohibition laws.

If the Congress had intended to over-ride State Laws, ignore the Constitution, abandon the duty imposed by the Liquor Enforcement Act of 1936, and thereby regulate that which it was its duty to suppress, it is incomprehensible that it would not have so declared expressly.

This principle was announced by Chief Justice Marshall, more than a hundred years ago in:

Cohens v. Virginia 6 W. 264; 51 L. Ed. 257.

This case, as every law student knows, involved the sale of lottery tickets in the State of Virginia contrary to the laws of that state. The Congress had chartered a corporation with power to authorize the drawing of lotteries for effecting any important improvements in the city, etc. The Act did not say where the tickets could be sold. Cohens was indicted for selling tickets in Virginia. His defense was that the Congress had authorized the sale. His defense was denied and he was convicted and his case affirmed.

The brilliance of the opinion of the Chief Justice on the Constitutional question has so dimmed the opinion on the merits that it seems to have been overlooked by even the Digesters, yet it settled a question of no less importance.

He said (6 W. 442):

> "To interfere with the penal laws of a state, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and *the intention would be clearly and unequivocally expressed.*"

See also:

Reid v. Colorado 187 U. S. 137, 148.

THE DECLARED PURPOSE OF CONGRESS

What was the declared purpose of the Congress in passing the Act? Let us quote part of Section 1:

> "To protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living."

Did the Congress here intend, in the light of generations of effort to suppress the evils of intoxicants, to pronounce that cheap contraband liquors would protect the standard of living of the class named, and that their incomes, their annuities, their pensions, and the wages of the laborer should be spent for cheaper outlawed liquor, when it has ever been the effort to have in war or peace a sober and an industrious people? Who would produce the best armaments, a sober or drunken worker? Whose savings would buy more bonds, the sot or the abstainer? But we shall not press the argument and abuse the Court's patience by asserting the obvious, nor follow through the ranks of the army from the private up to determine who is the healthier and better soldier.

> "To prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices."

Did the Congress here intend to pronounce that high

priced contraband liquor is a hardship to boys and girls in school, and to the faculty and students in universities and to Federal, State and local governments?

How would the "abnormal increase in prices" of whiskey hurt any of them? Was it the hope of the Congress that contraband liquor be kept cheap around schools and universities, so that the young manhood and womanhood could get more of it? Is there a state in the Union that does not have liquor control in their schools and universities?

It was not by chance, as we have seen, that liquor was placed in a class by itself in the Constitution.

> "To assist in securing adequate production of commodities and facilities."

Did the Congress intend that there should be an increase in the production of outlawed liquors? And the facilities for its production? The question carries its own answer.

> "To prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in Section 3."

The Court needs no comment from us on this clause.

> "And to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

Did the Congress have in its mind liquors? How long has it been since there was cooperation between the gov-

ernment and the production of contraband whiskey?

> "It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and other heretofore or hereafter crea ted), within the limits of their authority and jurisdiction, toward a stabilization of prices, fair and equitable wages, and cost of production."

Did the Congress intend to include liquor in their high purposes of government and to guarantee laborers cheap contraband?

There is not a line, sentence, or clause in the declaration of purpose in Section 1 that is not at war with the pronouncement of the Supreme Court of the United States on intoxicating liquors and its use and clearly demonstrates in the light of the history of intoxicating liquors that the Congress had not the slightest intention that contraband liquor was to be included in the beneficent purposes undertaken by the Congress.

ADMINISTRATIVE PROVISIONS OF THE ACT

Turning from Section 1 of the Act to its administrative provisions, it becomes more evident that the Congress did not intend nor have in mind proscribed liquors in drafting the Act.

This Court in the *Ziffrin* Case (308 U. S. 140) said:

"Property rights in intoxicants *depend on state laws and cease* if the liquor becomes *contraband."*

Let us turn for a moment to the Emergency Price Control Act and examine just a few of its provisions.

REGULATIONS

Under Section 2 (d) it is provided that when the Administrator deems it necessary, he may "regulate" or prohibit speculative or manipulative practices (including practices relating to changes in form, or quality,) or boarding in connection with any commodity, etc.

There could be no clearer pronouncement that those commodities covered by the Act were subject to regulation and control by the Administrator and prescribes appropriare penalties for hoarding and the power to prescribe change in form or quality of the commodity.

ADMINISTRATOR CAN BUY OR SELL COMMODITIES

Again under Section 2 (e) it is provided, among other things, that the Administrator "may, on behalf of the United States, without regard to the provisions of law requireing competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary *production* thereof or otherwise to *supply the demand therefor,* or make *subsidy payments to domestic producers* (only "moonshiners" are producers in Mississippi) of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to

obtain the maximum necessary production thereof."

Taking this provision in connection with the laws of any state where liquor is contraband and where the manufacture, possession, or sale of liquor is a violation of the laws of the state, is it to be conceived that the Congress intended that the Administrator should have the power to buy or sell at public or private sale, or store or use contraband liquor in such quantities as he deems necessary to obtain the maximum necessary production, or to supply the demand therefor, and make such subsidy payments to domestic producers (moonshiners) in such amounts and in such manner and upon such terms necessary to obtain the maximum necessary production, when to do any of these things would subject the Administrator to the penal provisions of the statutes of all states where liquor is contraband?

MAY ISSUE LICENSE

Under Section 205 (f) the Administrator may, if he deems it necessary and proper, issue a license as a condition of selling any commodity with respect to which to any regulation, order, or price schedule is applicable. If the contention of the learned Counsel for the Administrator be correct, and that the Administrator has the right in Mississippi to fix a maximum price on intoxicating liquors sold within this state, then, notwithstanding the laws of this state and in defiance thereof, he may license such dealers to sell liquors and control the sale thereof. Is it not inconceivable that the Congress would intentionally undertake to authorize any agency of the Government to license liquor dealers to sell contraband liquors, as pointed out by Chief Judge Maris in his dissent.

Throughout the entire Emergency Price Control Act there is not only no mention of intoxicating liquors, but every provision thereof carries on its face the intention of the Congress to safeguard the people of the Nation against exorbitant prices for life's necessities and not to make those things that are noxious more readily available in the market place.

MAXIMUM LAWFUL PRICE

Under the heading of definitions under Section 302 (i) the term "maximum price" is defined as meaning the "maximum lawful price for such commodities".

We can add nothing here to what Chief Judge Maris demonstrated in his dissent, except that there are legal commodities, as we have seen, and noxious commodities, and the Act was dealing with legal commodities only. It is but an addendum to that definition and a part of it.

In answer to Chief Judge Maris, the majority opinion assumes, as a major premise, that the Congress intended to authorize price fixing for contraband;

The Court said:

> "Were such a construction to be followed, it would result that noncompliance with the state statutes or ordinances *regulating* the sales of commodities—such as sales on Sunday, sales without the required licenses, sales of certain drugs without a doctor's prescription, and the like—would confer immunity from price control upon persons making sales in violation of the provisions of the Emergency Price Control Act."

There is no *regulation* of the sale of whiskies in Mississippi or any other prohibition state, for sale is prohibited.

And the failure of the Court to differentiate between noxious and innoxious commodities, between regulation and total prohibition, is apparent from an examination of the case of

Jatros v. Bowles 143 Fed. (2d) (C.C.A. 6) 453,

upon which the opinion is largely based.

This case involved the sale of whiskey by the glass, above ceiling price. Subject to State regulation, the sale of liquor in Michigan was lawful, and was not being used or sold contrary to the laws of the State. The importation was lawful and the Twenty-first Amendment and the liquor Enforcement Act did not apply. If State controls were obeyed the sale was as lawful as if it had been bread instead of booze. Being a lawful commodity, the ceiling price was a lawful maximum price. Since the Twenty-first Amendment did not apply, the State not having acted, the other provisions of the Constitution applied and the whiskey was a part of the legitimate commerce of the Nation and subject to the Commerce Clause, in so far as State regulations did not limit it.

U. S. v. Frankfort Distilleries U. S., 89, Adv. Op., L. Ed.

Head note 5, page 652.

As to sales on Sunday, we submit that if it be a lawful sale on Monday the Administrator's Regulations are valid. Sunday is a day of rest and worship. The character of the

commodity has no part in Sunday violations. No one is prosecuted on account of *what* they sold on Sunday but for selling anything prohibited by the law. Every day is Sunday in the prohibition states.

As for sales without the required license, we might be content to answer: Then let the Administrator issue the license as the Act empowers him to do. However, no law, is cited whereby any commodity is contraband because sold by an unlicensed vendor. It would be, indeed, strange if a suit of clothes purchased from a merchant whose license had expired lost its property rights and could be seized and forfeited, because a merchant had violated a *revenue* statute.

As to sales of certain drugs without a doctor's prescription conferring immunity from price control, it should be sufficient to say that we are not concerned here with either the Food and Drug Acts of the National Government or those of the States, nor are we advised as to whether the Administrator has undertaken to fix a maximum price on any drugs or dope. We are concerned here with the Twenty-first Amendment and the Statutes of Mississippi as touching whiskey, for which Petitioners were indicted for selling the above the ceiling price prescribed by Regulation 445.

No one knew better than the Congress of the legion of regulations and laws of the forty-eight states on intoxicating liquors, and the ever changing laws; that States wet today may be dry tomorrow as the local necessities may demand. The great cities are always wet for they have police protection, and the lack of such protection impels the sparsely settled communities to be dry. They prefer to get their liquor from the police protected cities. All these

things may be reasons why the Congress did not even discuss intoxicating liquors.

The Congress had obeyed the mandate of the American people by enacting the Liquor Enforcement Act and must have determined that it had expressed its will as to the prohibition states and that it could not empower the Administrator to license bootleggers or do the other things within these States to effectively enforce the Act under the administrative provisions thereof, and that it could not consistently seize and forfeit liquors entering these States and then give *tacit* permission to sell those liquors that got by through fixing a price for such sales.

NO BASIS UPON WHICH TO FIX MAXIMUM PRICE

Section 2(a) provides:

> "So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing *between* October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices *between* such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the *nearest two-week* period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order."

The "nearest two-week period" clearly means either the two weeks before October 1, or after October 15, as the

Congress was dealing with two-week periods. If not, then "between October 1 and October 15", 1941, is meaningless and the Administrator could fix any date he chose.

We have seen that there was not on those dates nor any other date in 1941 or since, any open market in Mississippi, and the Section quoted, on its face, demonstrates that the Congress had in mind legitimate commerce, and prices to be found in the open day.

How would he ascertain such "prevailing prices" of contraband liquor in Mississippi between any two dates? Did the Congress intend that he should send his "boys" down into the dens of vice, into "speak-easies", "honkey-tonks", back alleys and the subteranian world and interview and question the fleeting shadows who own or haunt these "joints"?

If so, what information would they get as to the "prevailing price" on the long past date named in the Act?

Does not all this smack too much of the "stool pigeons" who haunt the underworld to entrap criminals, and not to gather trustworthy information, to be part of a high and worthy policy of government to learn values and prices in the open market place?

One "speakeasy" would have "Old Taylor", another "Rocking Chair", another maybe "I. W. Harper", and so through all named in the indictment, and the lower dives "moonshine". Upon these shifting quicksands the Administrator must, as best he can, build a foundation for prevailing prices. Any price fixed would be arbitrary, both in amount and as to time. The Congress has, through the

spirit permeating the entire Act, negatived any such purpose or any such intention.

In Regulation 445, involved here, there is listed seventeen states, called "Monopoly States," requiring a different formula not applicable to the other thirty-one states. We can find nothing in the Act that covers this situation, except by implication, as to basic requirements as to freight rates, expenses, taxes, etc. The point we make is that intoxicating liquors is not a National problem, nor part of the National commerce, except by sufferance of the States. If, without express authority from the Congress, the Administrator felt compelled to deal separately with respect to the "Monopoly States", then why should he not feel impelled to deal separately with "Prohibition States" shielded by express Constitutional mandate?

His jurisdiction over necessities is National, but not over liquors. There are no "Monopoly States" or "Prohibition States" for "bread, beds and bungalows."

The Court below in answering this contention, after citing *Lincoln Savings Bank v. Brown* 137 Fed. (2d) (E.C.A.) 228, a case involving the rental prices for lock boxes, (just as legitimate as the rent of a horse or house) said:

"Since the Administrator is to ascertain and give due consideration to prevailing prices, only *so far as practicable,* (emphasis supplied by the Court) inability to ascertain prevailing prices in the State of Mississippi for illegal sales would not thereby have rendered the Price Regulation invalid."

Which means that, if, in the ever recurring experi-

ments by the States, a majority of the States shall at some future day "dry up" again, some future Administrator could fix prices for half the Nation at what he deems reasonable and equitable on the basis of what a few wet states did.

In the *Yakus* Case 321 U. S. 414, 427, the Court said:

> "The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purpose of the Act, and that in promulgating them consideration shall be given to prices *prevailing in a stated base period,* confer no greater reach for administrative determination than the power to fix just and reasonable rates."

What "base period" could the Administrator have chosen, how could he have discovered the prevailing prices?

The Act requires that he shall "so far as practicable, advise and consult *with representative members of the industry* (only bootleggers and "moonshiners" in Mississippi) which will be affected by such Regulation, and shall give consideration to their recommendations."

This breathes the very air of legitimate industries. Is it sufficient to consult with producers in Kentucky and fix prices in dry Kansas, or go to Ohio to find prices for dry Oklahoma, or Michigan and find prices for dry Mississippi? Is it conceivable that Congress had the prohibition states in mind when it wrote these provisions into the Act?

Here is one agency of the Government giving *tacit* permission to sell that which another agency is obligated to seize and forfeit.

Where is there in all the Codes of Christendom another paradox so grotesque?

PRICE REGULATION INCONSISTENT WITH STATE LAW

Since the Congress did not intend to deal with price fixing of whiskey in prohibition states, it is immaterial whether the Regulation is consistent or inconsistent with State law. The prevailing opinion limited its inquiry as to *sales* under the Regulation, and ignored the administrative provisions of the Act and held there was no conflict.

The Emergency Price Control Act confers, as a necessary measure of effective control, the power to license sales of contraband liquors, to buy, sell, store, aid in manufacture, encourage production, enter into voluntary agreements with producers, manufacturers, retailers, wholesalers; purchase commodities to obtain evidence of violations, and the like, every one of which would be in defiance of the laws of prohibition states and of Mississippi in particular. The conflict is obvious.

But, the Court said, the Regulation is valid on its face. We might answer that that depends from what capitol of which state you look upon it, whether from a wet or dry state. If the Regulation wore on its face the powers we have just noticed, we would not be admonished by the *Yakus* Case, that the Emergency Court of Appeals was the only Court where we could challenge the validity of the Regulation, because we would not then have to go behind the Regulation to discover its invalidity. It is because it is valid on its face that we went into that Court and why we seek admission here. The Twenty-first Amendment, the Stat-

utes of Mississippi, the Liquor Enforcement Act, the long legislative and judicial history are not reflected in the Regulation, but all lie behind it.

Every provision of the Act is consistent with the purpose of regulating the legitimate commodities of the Nation and wholly inconsistent with an intention to regulate those commodities that are inherently vicious, leaving those who deal in them to answer to the Criminal Codes, State and National.

The Federal Government cannot impose penalties even in aid of a State's prohibition laws.

U. S. v. Constantine 296 U. S. 287.

The Congress has not proclaimed that the National Emergency demands that the Twenty-first Amendment and the Statutes of the prohibition states shall be ignored in the interest of the war effort; it has not proclaimed that cheap liquors, in order to create a wider effective demand by workers, soldiers, students and the public, is necessary for the efficient prosecution of the war as was National prohibition in former wars. Only by such declaration can the need be known. The Congress being silent, there is no other agency of the Government that can so determine.

This is the first instance in the history of the Nation when any agency of the Government ever undertook, by law or regulation, in war or peace, to guarantee cheap liquor to the people of the Nation.

There is a current wise crack in Mississippi that "fifteen dollar a quart liquor has cured more booze heads than

all the Keely Institutions in the world".

The statement in the opinion that price controls were "necessary to remove the incentiv to divert supplies to an area where uncontrolled prices would otherwise be obtained, with subsequent pressure upon price control in neighboring States", might be plausible if the neighboring States were impotent to stop exportation and the Federal Government was not under *duty* to stop importation. In short, the logical conclusion is: The neighboring States do not choose to stop exportation, the Federal Government does not choose to stop importation, therefore, the liquor being in Mississippi, this conferred power to the Administrator to regulate. Power is not conferred upon an agency of the Federal Government by inaction, it must be conferred by express Constitutional grant. There is no interstate commerce here that creates implied power because of effects on that commerce, for these liquors are excluded from its protection. The problem calls for a policeman, not an Administrator.

The Court said: "Complainants have failed to establish that the *Regulation* in question is inconsistent with the laws of Mississippi, with the purposes of the Emergency Price Control Act, or invalid in any other particulars."

We have no witness except the Constitution, the Statutes of the State, the decisions of this Court, the provisions of the Act itself and the history lying behind them all. We respectfully submit they are credible witnesses.

The Government can tax but it cannot regulate contraband liquors.

We, therefore, submit that the Act should be held inapplicable to contraband liquors in Mississippi. Section 303 of Act.

SECOND:

....*Did the Congress have Constitutional power to regulate or delegate authority to regulate intoxicating liquors in States where such liquors are without property rights and contraband?*

We limit the question solely to that. We do not question the power of regulation in states where liquor is a lawful commodity. We have no such issue in this case.

Section 303 of the Act is as follows:

> "Sec. 303. If any provision of this Act or *the application of such provision to any person or circumstances* shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby."

We have undertaken to take the Act by its four corners and demonstrate that contraband liquors were not intended to be regulated under it. Of course, if no such purpose is disclosed by the Act, whether he had power or not is immaterial.

We have shown that no such power is to be implied, but must clearly appear. We have seen that such liquors are not named in the Act, and that under the Constitution they are divorced from all other commodities and com-

merce and placed in a separate category.

We have further seen that the only power Congress has over such liquors, in states where there are no property rights in them, is to prohibit and prevent importation or transportation into such states.

That Congress has the power to tax, we do not question. It can tax what it prohibits itslf or what the state prohibits.

But it cannot regulate, control or penalize that which the States have prohibited. The government can enter the state to collect its revenue, but it cannot in anywise intervene in the states' enforcemnt of its penal laws or create a property right in contraband. To do so would be to invade and usurp the police powers of the States.

This, we submit is so clear that any analysis of cases would be to demonstrate the common-place.

U. S. v. Constantine 296 U. S. 287.

Linder v. U. S. 268 U. S. 5, 18.

Does the war power of the Congress give such authority?

We do not question the broad powers of the Congress as to the "urgent business" of war.

The first prerequisite is to declare its purpose that it may be measured by the fundamental law.

As we have shown now and repeat, intoxicating liquors that enter States contrary to its laws, do so in violation of the Constitution. Can the Congress, as a war measure, regulate and penalize within such states?

No Congress has ever yet declared that a wider distribution of liquors was necessary to the prosecution of war.

Unless the pronouncements of science and the unanimous judgments of this Court are to be pronounced false, then absolute prohibition of the sale or disposition of intoxicating liquors is in aid of the war effort, and it is beyond the power of the Congress to invade or delegate the authority to invade the States and regulate the liquor traffic conducted there contrary to their laws, and do the things we have seen that the Administrator has power to do under the Emergency Price Control Act.

James Clark Distilling Co. v. Western Ind. R. R. Co. 242 U. S. 311, 332.

This case drew in question the Constitutional validity of the Webb-Kenyon Act and the West Va. Act prohibiting the importation of liquors for personal use. The Webb-Kenyon Act prohibited the importation, if in violation of State law.

The Court sustained both Acts, and in responding to the argument that the power of such regulation would destory the Commerce Clause of the Constitution, the Court said: (p. 332)

> "The fact that *regulations of liquor* have been *upheld* in numberless instances *which would have been*

repugnant to the *great guaranties of the Constitution* but *for the enlarged right possessed by government to regulate liquor* has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the Constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be Constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."

That intoxicating liquors have been left to the exclusive jurisdiction of the States, *if the States so choose,* is no longer a debatable question. Their police power is supreme. It is unnecessary to invoke the Tenth Amendment to demonstrate that. This Court has too often decided that issue. But the exclusive control by the State is guaranteed both by the Tenth and the Twenty-first Amendments. To enter the States and by regulation of intoxicating liquors contrary to the criminal laws of the State violates both Amendments, and is an invasion of the police powers of the State.

This Court has held that this cannot be done, either in war or peace.

In *Hamilton v. Kentucky Distilleries 251 U. S. 156,* this Court said:

"The war power of the United States, like its other powers and like the police power of the states, is sub-

ject to applicable constitutional limitations *(Ex parte Milligan,* 4 Wall. 2, 121-127; *Monongahela Nav. Co. v. United States,* 148 U. S. 312, 336; *United States v. Joint Traffic Asso.* 171 U. S. 505, 571; *McCray v. United States v. Joint Traffic Asso.* 171 U. S. 505, 571; *McCray v. United States,* 185, U. S. 27, 61; *United States v. Cress,* 243 U. S. 316, 326.)

In *Ex Parte Milligan,* just cited, it was said page 125:

> "No doctrine, involving more pernicious consequences, was ever invented by the wit of men than that any of its (the Constitution) provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to Anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the its existence . . . . "

The necessity of creating *Quasi* property rights in that in which the State has destroyed all property rights, by price fixing and regulations cannot be found in the history of intoxicants by legislative enactments or decisions of Courts. The duty of the government to seize and forfeit is a negation of any right or power to price and sell.

After the adoption of the Twenty-first Amendment the American people viewed with satisfaction the folding of the tents of the "fanatical drys" and the "whiskey rings", and the gathering up of their choice adverbs and adjectives and statistics and their departure to their state Capitols there to wage ceaseless war for ages to come as they have for generations past, with alternate triumphs and defeats. But whatever laws emerge they shall be respected by the

National government, whether they be wise or foolish in other men's judgment. The wisdom of this Court has been justified: The States only are competent to cope with the problem.

The Government can avoid the charge of being *in pari delicto* with those who run the state's red stop lights, by using its great powers in aiding the state in handling a most difficult problem, and not hampering by displaying its own green lights to proceed as long as they do not exceed the price limits prescribed by Regulation.

We earnestly submit that the Writ of Certiorari should be granted and the judgment dismissing the complaint should be reversed.

VICTOR W. GILBERT

CHARLES B. CAMERON

.....

Attorneys for Petitioners

403 Threefoot Building
Meridian, Miss.

I hereby certify that copies of the foregoing Petition for Writ of Certiorari and Supporting Brief and Record have been served upon the Solicitor General of the United States and Respondent.

This, the .....day of September, 1945.

.....

ATTORNEY